NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA 07-570

	Opinion Delivered FEBRUARY 20, 2008
DANIEL HEARNE and DEBORA HEARNE APPELLANTS	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, [NO. CV 2005-836]
V.	HONORABLE J. MICHAEL FITZHUGH, JUDGE
DIANE BANKS APPELLEE	REVERSED AND REMANDED ON DIRECT APPEAL; AFFIRMED ON CROSS-APPEAL

JOHN B. ROBBINS, Judge

In *Hearne v. Banks*, No. CA00-396 (Ark. App. Dec. 20, 2000), this court affirmed a ruling that a certain piece of real property in Sebastian County was owned by three individuals as joint tenants with right of survivorship. The present case seeks a partition of the interests determined in the prior case. Appellants Daniel Hearne and his wife, Debora Hearne, neither being one of the three co-owners in the earlier case, claimed to have acquired the interests of two of the three joint tenants.[1] Appellee Diane Banks was the third co-tenant. Hearne and Banks are siblings. After a disagreement between Hearne and Banks, Hearne filed an action

[1]For simplicity, we refer to Daniel Hearne as the sole appellant, unless the context requires otherwise.

seeking to partition the property. The circuit court denied the petition and ruled that Hearne did not have any interest in the property and that Banks was the sole owner of the property. Hearne appeals those decisions, raising two points. Banks cross-appeals, arguing that the circuit court erred in denying her motion for attorney's fees as Rule 11 sanctions for discovery violations. We reverse and remand on direct appeal and affirm on cross-appeal.

The three joint tenants were Banks, her then-husband David Banks, and her mother, Betty Hearne. The original deed, recorded on September 9, 1996, listed David Banks and Diane Banks as the grantees. That deed was re-recorded on October 22, 1996, to add Betty Hearne as a grantee. Also added to the deed via the re-recording was the language "This deed being re-recorded to correct grantees name." Betty Hearne conveyed her interest to Daniel Hearne by quitclaim deed dated October 7, 1999. The deed was not recorded until January 14, 2004, four days after Betty Hearne's death. David Banks conveyed his interest to Hearne and Hearne's wife by quitclaim deed dated September 29, 2004.

Hearne filed his petition seeking partition on July 1, 2005, alleging that he and Banks were in dispute over an appropriate division of the property between them. The petition sought a sale of the property, with the proceeds to be divided according to the parties' interests. Banks filed an answer denying the material allegations of the petition.[2] Banks also filed a counterclaim in which she asserted that it was the intention of both Betty Hearne and David Banks for her to receive the property. The counterclaim further asserted that Hearne

[2]Banks amended her answer to assert that the property was her homestead. She again amended her answer to assert that, if a partition were ordered, she should be entitled to the first $35,000 in proceeds.

did not acquire any interest in the property from their mother because Betty Hearne retained control over the quitclaim deed throughout her lifetime and that the deed was a forgery.[3]

David Banks and Diane Banks joined in executing a quitclaim deed of the property to Diane Banks. The deed was dated May 5, 2006, and recorded on May 16, 2006.

After a hearing in which Hearne, Banks, and David Banks testified about the deed from Betty Hearne to Daniel Hearne; the deed from David Banks to Hearne; and other matters, the circuit court requested that the parties brief the issues. In his brief, Hearne argued that co-tenants have an absolute and unconditional right to partition. He also argued that collateral estoppel applied to bar the relitigation of the ownership of the property because that issue was determined in the earlier case. He also addressed the issues of whether the deed he received from Betty Hearne was a forgery and whether the deed he received from David Banks was obtained by fraud.

In her post-trial brief, Banks argued that res judicata did not apply because the parties in the two actions were not the same; that the deed by which she and David Banks originally obtained the property could not be changed by the grantors so that Betty Hearne never acquired an interest in the property; and that the deed from Betty Hearne to her son was never delivered to him prior to Betty Hearne's death so that Hearne never acquired an interest in the property via the quitclaim deed. She also addressed the issue of whether the deed from Betty Hearne was a forgery, as well as the imposition of Rule 11 sanctions.

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[3]The counterclaim also sought an accounting of the assets in Betty Hearne's estate. The circuit court ordered the accounting. No issue is made regarding the accounting.

The circuit court entered its order on February 16, 2007. The court first addressed Hearne's argument that the decision in the earlier case barred relitigation of Hearne's interest in the property. The circuit court rejected this argument, finding that collateral estoppel, or issue preclusion, did not apply because the parties were not the same in the two actions. The court then found that the re-recording of the deed by which the Bankses obtained their interest was not a correction deed and that Betty Hearne did not become a joint tenant by that re-recording of the deed. The court noted that the Bankses would have had to execute a deed to themselves and Betty Hearne for Betty Hearne to become a joint tenant. The court then found that Hearne did not acquire any interest by the deed from David Banks because there was no consideration for the deed, resulting in a violation of the statute of frauds. As a result, the court concluded that Hearne had no interest in the property and that Banks was the sole owner. Hearne filed his notice of appeal on March 9, 2007.

The circuit court entered its order in favor of Banks on February 16, 2007. On February 23, 2007, she filed a motion seeking $8,856.75 in attorney's fees. The motion cited Ark. R. Civ. P. 11 as a basis for the award and alleged that Hearne had been untruthful in his answers to several discovery requests. The circuit court denied the motion without explanation on March 15, 2007. Banks filed her notice of cross-appeal on March 21, 2007.

This court will not set aside the findings of a circuit court in a partition action unless they are clearly erroneous. *See Hendrix v. Hendrix*, 256 Ark. 289, 506 S.W.2d 848 (1974).

In his first point, Hearne argues that the circuit court erred in finding that collateral estoppel does not apply because this court had affirmed the earlier determination that Betty

Hearne and the Bankses were joint tenants with right of survivorship. The circuit court ruled that Betty Hearne was not a joint tenant with Diane and David Banks because she did not receive her interest directly from the Bankses. This finding improperly goes behind the earlier holding of the trial court, which we affirmed in the first appeal, that Betty Hearne was a joint tenant with right of survivorship. Where a court has jurisdiction of the subject matter, its judgment, even if erroneous, is conclusive so long as not reversed and cannot be attacked collaterally. *Reyes v. Jackson*, 43 Ark. App. 142, 861 S.W.2d 554 (1993); *Rowland v. Farm Credit Bank*, 41 Ark. App. 79, 848 S.W.2d 433 (1993).

The circuit court found that collateral estoppel did not apply because the parties in the two actions were not the same. Collateral estoppel does not require mutuality of parties before the doctrine is applicable. *Johnson v. Union Pac. R.R.*, 352 Ark. 534, 104 S.W.3d 745 (2003). Further, Banks *was* a party to the earlier divorce action. The four elements of collateral estoppel are: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *See Parker v. Johnson*, 368 Ark. 190, ___ S.W.3d ___ (2006).

First, an issue in the first case was the extent of Betty Hearne's interest in the property. Banks asserts that the issues are not the same because the issues in the earlier case were whether David Banks committed fraud, whether Betty Hearne had made a gift of an interest to David Banks, and whether there should be an equitable lien or a constructive trust on the proceeds of the sale for Betty Hearne's benefit. However, all of these issues are subsumed in

the larger issue of the extent of Betty Hearne's interest in the property because she contended that she alone owned the property. Second, the extent of Betty Hearne's interest in the property was litigated because the divorce court determined that Betty Hearne, Diane Banks, and David Banks were joint tenants with right of survivorship. Banks asserts that the issues of the validity of the deed and its re-recording were not actually litigated because Betty Hearne had nothing to gain from the issue. That is of no moment because, in the divorce case, Banks testified that the "deed accurately reflects the way the real property is titled." (No. CA00-396, Abs. 13) This testimony in the earlier divorce case now bars her from challenging the validity of the re-recorded deed. *See Dupwe v. Wallace*, 355 Ark. 521, 140 S.W.3d 464 (2004). As to the third and fourth elements, Banks does not argue that these elements are not met. All four elements are met in the present case, and therefore, the circuit court erred in determining that Betty Hearne was not a joint tenant with right of survivorship.

We turn now to Hearne's second point on appeal where he contends that the circuit court erred in finding that he did not have an interest in the property. He argues that he is a joint tenant with right of survivorship because of the earlier finding involving Betty Hearne. However, just because Betty Hearne *was* a joint tenant with right of survivorship does not mean that Hearne is now a joint tenant with right of survivorship. This is because of the series of conveyances that have taken place since the first case was affirmed on appeal.

Neither the parties nor the circuit court examined the elements of a joint tenancy with right of survivorship. When Betty Hearne conveyed her interest to Hearne, he became a tenant in common with the Bankses, who continued to be joint tenants. *See Jackson v.*

O'Connell, 177 N.E.2d 194 (Ill. 1961); *In re Estate of Thomann*, 649 N.W.2d 1 (Iowa 2002); *Boissonnault v. Savage*, 625 A.2d 454 (N.H. 1993). The divorce decree between Diane Banks and David Banks did not automatically sever the joint tenancy because the decree specifically provided that the property would be held as a joint tenancy with right of survivorship. *See* Ark. Code Ann. § 9-12-317(a) (Repl. 2002);[4] *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996).

The circuit court would not be precluded from inquiring whether the deed from Betty Hearne to her son was a forgery or whether that deed was delivered because those issues were not litigated in the first case. A forged deed does not pass title. *Schwarz v. Colonial Mortgage Co.*, 326 Ark. 455, 931 S.W.2d 763 (1996). Likewise, a deed is inoperative unless there is a valid delivery. *Johnson v. Ramsey*, 307 Ark. 4, 817 S.W.2d 200 (1991); *Wilson v. McDaniel*, 247 Ark. 1036, 449 S.W.2d 944 (1970). If the deed from Betty Hearne to her son had, in fact, been forged or not delivered, she would have died holding an interest in the property which would have passed to Diane Banks and David Banks by operation of law as the surviving tenants of a joint tenancy. *See Gladson v. Gladson*, 304 Ark. 156, 800 S.W.2d 709 (1990). An essential element of a valid delivery is the grantor's intention to pass the title immediately. *Parker v. Lamb*, 263 Ark. 681, 967 S.W.2d 99 (1978). The questions of intent by the grantor

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[4]Section 9-12-317(a) provides in pertinent part:

> (a) Hereafter, when any circuit court in this state renders a final decree of divorce, any estate by the entirety or survivorship in real or personal property held by the parties to the divorce shall be automatically dissolved *unless the court order specifically provides otherwise*[.] (Emphasis added.)

and the delivery of the deed are questions of fact. *Hunter v. Hunter*, 198 Ark. 8, 127 S.W.2d 249 (1939). The circuit court did not address these issues. Without their determination, we cannot decide whether the circuit court properly denied Hearne's petition for partition.

Although the circuit court addressed the deed from David Banks to Hearne and found the deed to be a nullity, based on a lack of consideration and a violation of the statute of frauds, we remand this issue to the circuit court because its basis for decision on this issue is not entirely clear to us. We also note that, generally, inadequacy of consideration is not a ground for setting aside a voluntary conveyance. *Dyson v. Ferncliff Props., Inc.*, 16 Ark. App. 64, 696 S.W.2d 767 (1985). However, that rule applies only in the absence of fraud. *Cuzick v. Lesly*, 16 Ark. App. 237, 700 S.W.2d 63 (1985). Here, David Banks testified to events surrounding the execution of the deed that could be considered fraud.

In Banks's sole point on cross-appeal, she argues that the circuit court erred in not awarding her attorney's fees because an award of sanctions is mandatory under Rule 11. *See Ward v. Dapper Dan Cleaners & Laundry, Inc.*, 309 Ark. 192, 828 S.W.2d 833 (1992). We review decisions concerning Rule 11 violations under an abuse-of-discretion standard. *Id*. The circuit court denied Banks's fee motion without explanation, implicitly finding that there was no violation. Banks had the burden of proving a violation of Rule 11. *Parker v. Perry*, 355 Ark. 97, 131 S.W.3d 338 (2003). She does not argue that the circuit court erred in not finding that Hearne violated Rule 11. Therefore, we cannot say that the circuit court abused its discretion in not awarding attorney's fees to Banks.

We deny Banks's motion for attorney's fees and costs for a supplemental abstract and addendum.

Reversed and remanded on direct appeal; affirmed on cross-appeal.

GLADWIN and HEFFLEY, JJ., agree.